TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This is an appeal of a decision in a Motion to Set Aside Judgment pursuant to Missouri Supreme Court Rule 74.06 in St. Louis County, Missouri.

This case was transferred to this Court form the Missouri Court of Appeals for the Eastern District of Missouri under its order of March 30, 2004 pursuant to Mo. Const., art V. Section 10.

This Court having authority under Mo. Const. art. V, Section 10 to finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, has jurisdiction to hear and determine this case.

STATEMENT OF FACTS

Steven Tomey will hereinafter be referred to a "Father" and Andrea Dietrich will hereinafter be referred to as "Mother." References to the Legal File are designated "L.F." References to the transcript of the January 30, 2002 proceeding are designated "Tr.1." References to the transcript of the March 19, 2003 proceeding are designated "Tr.2." References to Appellant's Appendix are designated "Appellant App." References to Respondent's Appendix are designated "Respondent App." References to Appellant's Substitute Brief are designated "App. Sub. Br."

The marriage of Mother and Father was dissolved by this Court on May 31, 1996. There was one child of the marriage, who will be referred to as "Minor child." Mother and Father were awarded joint legal and Mother was awarded primary physical custody of the minor child. (L.F. 29, 30).

On or about April 19, 2001, Father received, by certified mail return receipt requested a letter from Mother indicating her intentions to relocate the primary residence of the minor child to the Henderson, Nevada area. (Tr.2, 59). She planned to move on June 15, 2001, to be with her fiancée, who she would not marry until July 4, 2001 (Tr. 2, 16). This letter indicated that she had already quit her job in St. Louis in reliance upon her ability to relocate. (Respondent App. A-2).

After Father received the letter on April 19, 2001, he filed his Verified Objections to Mother's Proposed Relocation, on May 3, 2001, only two weeks after having received the notice. Although Father indicates in his objections that he received Notice on March 23, 2001 (L.F. 7), he later testified that he meant that the letter that he received was dated

March 23, 2001. (Tr.2, 59) He did not actually receive a certified letter from Mother until April 19, 2001. That letter, however, was dated March 23, 2001. (Respondent App. A-2).

One Month following Father's filing of his Objections to Mother's Proposed Relocation, on June 4, 2001, Father filed his Motion for Temporary Restraining Order, and the court granted said order, enjoining Mother from relocating with the minor child. (L.F. 17) In said Petition, Father indicated that he had received notice of Mother's proposed relocation in April of 2001 (L.F.17). At that time, Mother was represented by counsel and filed no objections, nor did she attempt to challenge the jurisdiction of the trial court.

On or about October 22, 2001, Father filed his Motion to Modify requesting primary custody of the Minor Child if Mother is allowed to Relocate, and Joint custody if she is not allowed to Relocate. (L.F. 21). At no time during the many pretrial conferences relative to this Motion to Modify did Mother attempt to challenge the jurisdiction of the court herein.

On or about January 30, 2002, trial was heard in this Matter on Father's Objections to Mother's Proposed Relocation and Father's Motion to Modify. At no time during the lengthy trial in this matter, did Mother challenge the jurisdiction of the trial court or indicate that Father's response to Mother's proposed relocation was untimely. In fact, the only testimony adduced at trial relative to Petitioner's Exhibit 4 (Appellant App. C) indicated that the only indication she had of Father's receipt of the notice was that he signed the receipt on April 19, 2001. (Tr.1, 245).

On March 13, 2002, this Court entered Findings of Fact and Conclusions of Law, and Family Court Judgment/Decree of Modification of Dissolution of Marriage. (L.F. 29-39) The Court denied Father's Motion to Modify, and also denied Mother's request to relocate the principal residence of the minor child. (L.F. 29-39) The court specifically found that the Parenting Plan which the parties had adopted as a part of their 1996 decree was in the best interests of the minor child. (L.F. 39) The court further found that "the choice to live in Nevada is not for the best interests of the child." (L.F. 34).

On or about April 8, 2002, Mother filed her Motion for a New Trial and/Or Motion to Amend Judgment wherein she requested, *inter alia* that the court "more specifically provide that Mother, as the primary residential custodial parent, shall be entitled to enroll the child in the school district of her residence in St. Louis." (Respondent App. A-4) Nowhere in her post-trial motion does Mother raise the issue that Father's response to her Notice of Intent to Relocate was untimely, and indeed the relief requested therein contemplates her remaining in St. Louis.

On or about May 23, 2002 the court entered its Judgment partially sustaining Mother's post-trial motion, and amending "paragraph 22 of the judgment entered on March 13, 2002…to reflect the intent of the court that Mother's residence as of the start of school in Fall 2002 shall be designated the residence for school purposes." (Appellant App. 41) In reliance thereon, in the Fall of 2002, Mother enrolled the minor child in the Parkway school district, the school district in which she resided. (Tr. 2, 38).

Mother did not appeal the trial court's judgment of March 13, 2002. In fact, she testified that she was aware that the time for filing her Notice of Appeal had actually elapsed. (Tr. 2, 46).

Nearly one year following the entry of the trial court's March 13, 2002 Judgment, on February 6, 2003, Mother filed her Motion to Set Aside Judgment, alleging for the first time, that Father's response to Mother's Notice of Proposed Relocation was untimely and that the trial court was without subject matter jurisdiction to enter its judgment.

Trial was heard in the matter on March 19, 2003. At trial, Mother testified to the following: Mother sent to Father two notices of her intent to relocate (Tr.2, 15). She sent the second letter on April 16, 2001. (Tr.2, 16). In that letter she crossed out the incorrect address of Lindbergh High School and entered Father's correct home address. (Tr.2, 34) She did this because she had previously sent the letter to Father's place of employment and she did not know whether he had actually received it. (Tr.2 ,31) She wanted to be sure that Father actually received it so she sent it again (Tr.2, 31). The only evidence relative to the date upon which the letter was received by father was the letter for which Father signed on April 19, 2001 (Tr.2, 37).

Mother further testified that she had removed the minor child from the Lindbergh School District and enrolled him in Parkway, contrary to Father's wishes. (Tr.2, 40). The minor child had significant difficulty with the transition (Tr.2, 41). Mother further testified that she and her current husband were having significant marital problems and she was contemplating divorce. (Tr. 2, 41).

Father testified that although he received a letter from his ex-wife at work, he did not sign for it. (Tr.2, 54). He was unsure of the exact date that it arrived at the school because he does not check his school mailbox every day. (Tr.2, 58) He did, however, receive a notice at home to pick up a certified letter at the post office. That letter was sent on April 16, 2001 and dated March 23, 2001. (Tr.2, 59). Upon receiving said letter on April 19, 2001, he filed his objections to Mother proposed relocation on May 3, 2001 (Tr. 2, 60, L.F. 7).

On March 26, 2003, the trial court denied Mother's Motion to Set Aside. (L.F. 95). As grounds therefor, the trial court reasoned that the only evidence that Mother was able to provide regarding the date Father received Mother's Notice was the certified mail receipt bearing Father's signature dated April 16, 2001. (L.F. 95). The trial court found the following: "based on the credible evidence presented at the trial on January 30, 2002 and the hearing on March 19, 2003, Father filed his objections within the 30 day period prescribed by Section 452.377. Therefore, the court had jurisdiction to enter the judgment of March 13, 2002.

This appeal followed. (L.F. 99). On December 23, 2003, the Eastern District affirmed the trial court's March 26, 2003 Judgment and issued a informational memorandum. The Eastern District Court of Appeals found the following:

> This requires no extensive analysis. There is some evidence in the record of Father receiving notification of Mother's intent to relocate in March of 2001; however, such notification did not comply with the statute. There is no evidence that Father signed for the letter. And the receipt of such notice was rendered

doubtful by Mother's failure to offer an exhibit in support of her claim. In any case, Father could be reasonably confused by Mother's two notices since the first notice did not comply with the statute and Father received a second notice which did comply. Father received this second notice on April 19, 2001. Therefore, his objection on May 3, 2001 was timely. Ergo, the trial court had subject-matter jurisdiction to render its judgment of March 13, 2002. And thus the motion court's judgment of March 26, 2003 is not in error. The judgment is affirmed." (Appellant's App. A-31).

Mother's Motion for Rehearing was denied by the Eastern District Court of Appeals on February 26, 2003.

This Court granted Mother's request for transfer to this Court on March 30, 2004.

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR BY RULING THAT FATHER FILED HIS OBJECTIONS WITHIN THE 30 DAY PERIOD PRESCRIBED BY SECTION 452.377.7 BECAUSE SUBSTANTIAL AND CREDIBLE EVIDENCE SUPPORTED THE FINDING THAT FATHER RECEIVED THE PROPER STATUTORY NOTICE OF MOTHER'S INTENDED RELOCATION. ON APRIL 19, 2003 AS PRESCRIBED BY SECTION 452.377.7.

Section 452.377 R.S.Mo.

II.

THE TRIAL COURT DID NOT ERR IN DENYING MOTHER'S MOTION TO SET ASIDE THE TRIAL COURT'S JUDGMENT BECAUSE IT HAD SUBJECT MATTER JURISDICTION UNDER 452.377 AS FATHER FILED HIS OBJECTIONS TO MOTHER'S RELOCATION WITHIN THE PRESCRIBED STATUTORY PERIOD; AND IN THE ALTERNATIVE, EVEN IF THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THIS FINDING, MOTHER'S CLAIMS HEREIN ARE BARRED BY 1) LACHES; 2) ACCEPTING THE BENEFITS OF A JUDGMENT; 3) THE PRINCIPLE THAT A 74.06 MOTION IS NOT A SUBSTITUTE FOR AN UNTIMELY APPEAL.

Section 452.377 R.S.Mo.

Pavlica v. Director of Revenue, 71 S.W. 3d 180 (Mo. App. W.D. 2002)

Green v. Green, 26 S.W.3d 325 (Mo. App. 2000)

Soucy v. Soucy, 979 S.W.2d 504 (Mo. App. E.D. 1998)

ARGUMENT

THE STANDARD OF REVIEW

The standard of review of the trial court's denial of Mother's Motion to Set Aside Judgment is governed by the principles of Murphy v. Carron, 536 S.W.2d 30 (Mo. Banc. 1976). The trial court's decision should be affirmed "unless there is substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Id. at 32. In this case, there is substantial evidence to support the trial court's decision, and the trial court neither erroneously declared the law, nor erroneously applied the law and therefore the trial court's decision should be affirmed, and the dictates of Breman Bank and Trust v. Muskopf, 817 S.W.2d 602 (Mo. App. E.D. 1991) do not apply herein.

The phrase "weight of the evidence" as it is used in Murphy v. Carron, means its weight in probative value, not the quantity or the amount of evidence. The "weight of the evidence" is not determined by mathematics; instead the weight of the evidence depends on its effect in inducing belief. Johnson v. Gregg, 807 S.W.2d 680, 685 (Mo. App. S.D. 1991). Appellate courts should exercise the power to set aside a judgment on the grounds that it is against the weight of the evidence with caution and only when they have a firm belief that the decree or judgment is wrong. Murphy v. Carron, 536 S.W.2d 32.

I.

THE TRIAL COURT DID NOT ERR BY RULING THAT FATHER FILED HIS OBJECTIONS WITHIN THE 30 DAY PERIOD PRESCRIBED BY SECTION 452.377.7 BECAUSE SUBSTANTIAL AND CREDIBLE EVIDENCE SUPPORTED THE FINDING THAT FATHER RECEIVED THE PROPER STATUTORY NOTICE OF MOTHER'S INTENDED RELOCATION. ON APRIL 19, 2003 AS PRESCRIBED BY SECTION 452.377.7.

Mother's first Point Relied on must be stricken because she fails to comply with Missouri Supreme Court Rule 84.04(d)(C) in that she fails to state the legal reasons for her claims of reversible error and she fails to explain why the legal reasons, in the context of the case, support the claim of reversible error.

Father further asserts that in her first Point Relied On, Mother misstates the findings of the trial court. Mother asserts: "The trial court erred in finding that Appellant's Notice of the proposed relocation with the parties' minor child was defective because Respondent failed to personally sign the return-receipt and further concluded that the evidence did not show that Respondent received the Notice…." (App. Sub. Br. 15) The trial court actually found the following: "[Mother did, however, present evidence (Petitioner's Exhibit 4) at the trial in January 2002 that documented that Father had received the later registered mail notice that she sent in April 2001 to Father's home address on or about April 16, 2001…. The court finds that based on the credible evidence

presented at the trial on January 30, 2002 and the hearing on March 19, 2003, Father filed his objections within the 30-day period prescribed by Sect. 452.377. Therefore, the court had jurisdiction to enter the judgment of March 13, 2002." (Appellant. App. A-27). Rather than finding that Mother's Notice to Father was defective, the trial court specifically found that the Notice Mother sent to Father in April of 2001 was proper. It is to this Notice which Father timely responded. Father respectfully urges this Court to review the findings of the trial court as Mother has consistently mischaracterized them throughout her brief.

Mother further asserts in her brief, "In its March 26, 2003 Judgment, the trial court found that there was insufficient evidence to support that Respondent received the Notice, but that there was evidence that the copy of the Notice was received by Respondent (App. Sub. Br. 16)." In so asserting, Mother again misstates the findings of the trial court. As stated *supra*, the trial court does not refer to the notice received by Father on April 19, 2003 as a "copy." The April Notice was the only proper notice that Father received. Mother bears the burden of proving Father's receipt herein. The only proof she was able to offer at the Motion to Set Aside (The *only* judgment which is the subject of this appeal) was that Father received notice on April 19, 2001 (See Petitioner's Exhibit 1, Resp. App. 1)

In Missouri, the relocation of children is governed by Section 452.377 R.S.Mo. Section 452.377.2 expressly provides:

Notice of a proposed relocation of the residence of the child, or any party entitled to custody or visitation of the child shall be given in writing by certified mail, return

receipt requested, to any *party* with custody or visitation rights. Absent exigent circumstances as determined by a court with jurisdiction, written notice shall be provided at least sixty days in advance of the proposed relocation (emphasis added).

Section 452.337.7 Further provides:

The residence of the child may be relocated sixty days after providing notice, as required by this section, unless a parent files a motion seeking an order to prevent the relocation within thirty days of *receipt* of such notice…. (emphasis added).

In asserting in her brief that "In the March 26, 2003, Judgment on Petitioner's Motion to Set Aside, the trial court reversed its initial finding of fact by stating that the March 23, 2001 Notice had not been sent via certified mail, and as a result, notice was not sufficient under the relocation statute," (App. Sub. Br. 18), she grossly misstates the findings of the trial court. Respondent urges the court to review the trial court's March 26, 2003 findings (L.F. 94-95) To wit:

"The court's references in paragraph 4 of the Judgment of March 13, 2001 to Mother sending notice on or about March 23, 2001 "pursuant to Sect. 452.377" was not intended to be a finding that Father received registered mail notice on that date. At the trial in January 2001 [sic], neither of the parties raised an issue as to whether notice to Father was by registered vs. regular mail.

The court finds that based on the credible evidence presented at the trial on January 30, 2002 and the hearing on March 19, 2003, Father filed his objections within the 30 day period prescribed by Section 452.377. Therefore, the court had jurisdiction to enter the Judgment of March 13, 2002 (L.F. 94-95)."

"Paragraph 4" of the Family Court Judgment to which the court refers in its March 26, 2003 Judgment follows: "Pursuant to section 452.337 R.S.Mo., Mother sent Father notice of her proposed relocation of the minor child to the Henderson Nevada area on or about March 23, 2001. Father filed his objections to relocation on May 3, 2001 (L.F. 41, L.F. 7)."

A close reading of the relocation statute herein reveals that not only must Mother send (by certified mail) notice to Father of her intended relocation, pursuant to 452.377.2, Father must *actually receive* said notice in order to respond pursuant to 452.377.7. The trial court, in its March 26, 2003, finding, did not improperly reverse its finding of March 13, 2003. It merely clarified it. The court did not presume that Father had received the notice on the date it was purportedly sent (L.F. 94). The court merely found that Mother sent notice (L.F. 94). In order to satisfy section 7 of the relocation statute, Father must file a motion seeking an order to prevent the relocation within thirty days of *receipt* of such notice (such notice, is of course, to be receive by certified mail, return receipt requested.)

Not only did the trial court not reverse its initial finding as suggested by Mother (App. Sub. Br. 18), its finding on March 26, 2003, was supported by substantial and overwhelming evidence, and must be upheld.

Mother asserts that the trial court references Petitioner's Exhibit 4 in its Judgment. The Questions by Attorney Catherine Keefe and answers by Mother surrounding the admission of Petitioner's Exhibit 4 in January of 2002 follow:

Q. Are those the certified letters, the receipts?

A. They are the receipts.

Q. Okay. When was the first one?

A. The first one looks like it was mailed on March 27th—well, it was received—no, mailed on March 27th, received on March 29th.

Q. Are you able to identify who signed on the document?

A. Not really.

Q. When was the second sent?

A. April 16th was sent, received April 19th.

Q. Are you able to identify who signed on the second?

A. Yes.

Q. And who was that?

A. Steven Tomey.

(Tr.1 P. 245 ln. 8-24)

It is clear from Mother's own Exhibit 4 that Father neither signed for, nor received her relocation Letter in March of 2001. In fact, she admits that it was not even sent until March 27th. Further, Mother admits that she sent the first letter to Lindbergh High School, Father's place of employment. Because Father did not actually sign for it, he did not know when it actually arrived. Mother, having clearly realized that she did not properly notify Father, cured her own notice defect by sending the same letter to Father's home address on April 16, 2001, rather than to his place of employment. According to Section 452.377.7, the thirty days within which Father must object to the relocation begin to toll upon his statutory receipt of Notice. Father did not sign for the certified mail letter

until April 19, 2001 when he received it at his home address. (Tr. 2 59) He timely filed his objections on May 3, 2001.

Although Mother fails to assert the following, both the trial court and the Eastern District Court of Appeals point out that Mother fails to enter Exhibit A or any other Exhibit establishing Father's receipt of the letter in March, during the March 19, 2003 hearing (Appellant App. A-31, A-26.) The only evidence that was presented at that hearing was Petitioner's Exhibit 1, which was the letter evidencing the return receipt of April 19, 2003 (Respondent App. A-2.) Indeed, however, if Mother had presented her Exhibit 4, the only proof of receipt it would have demonstrated would have been that Father received and signed for said notice of relocation on April 19, 2001 (Appellant App. A-8.)

Mother further asserts the following in her brief: "Absolutely no evidence or even an unsupported denial was offered to refute the clear evidence that Petitioner sent the Notice via certified mail, return receipt requested, that Respondent had received it and failed to file his objections within thirty (30) days after receiving it." (App. Sub. Br. 18). The foregoing and following indicate, however, that Mother yet again misstates and mischaracterizes the evidence adduced at trial.

At the hearing on March 19, 2003, Father testified to the receipt of the certified letter:

The Questions by Attorney Hais and Answers by Father follow:

Q. And did you receive the March 23rd letter in April?

A. Yes, I did receive the letter again.

Q. And did you have—did you have conversations with her [Mother] during March, if you recall? Did you—If you don't remember—I don't know if you would remember.

A. No.

Q. Okay. So then, Steve, can you tell the Court, did you then receive the letter that's dated March 23, 2001, by certified mail?

A. Yes. I then, at a later date in April, received actually the receipt at my home address that I have a certified letter to pick up at the post office. I went to the post office and signed and received the letter you have in your hand.

Q. And the letter that I have, it says certified mail, return receipt requested, and is there a strikeout at the top? In other words---

A. Yes. My name and school address has been crossed out.

Q. And another address has been written in?

A. My home address has been written in. (Tr.2 58-59)

This letter was admitted into evidence as Petitioner's Exhibit 1 at the March 19, 2003 hearing (Respondent. App. A-2).

At that same hearing, Mother further established her need to send an additional letter to Father to notify him of her proposed relocation.

Q. (By Attorney Hais) Well, then, why would you then send Mr. Tomey another letter certified receipt?

A. (By Mother) Because during that time we had verbal conversations and he never made mention that he received it, and I thought that unusual. *So to be sure*, I sent a second identical letter to his home as well. (Tr.2 31, emphasis added).

It is clear that Mother, having received the return-receipt which was not signed by Father, realized her mistake in sending the letter to Father's place of employment. She testified that in order to be sure that he *actually* received the letter (as required by Section 452.377.7), she properly sent it to his home.

Mother asserts in her brief that Husband admits to having received the notice, and to twice failing to respond within the 30 days (App. Sub. Br. 18). Mother grossly misstated Father's testimony. Father actually testified:

Questions by Attorney Hais and Answers by Father:

Q. And so the first time you received the letter, do you know when it was in the mailbox at school or are you just referring to the date on the letter?

A. I have only reference to the date on the letter. I do not check my mailbox every day necessarily down in the principal's office.

Q. So you did, in fact, receive a letter that's dated March 23, 2001, correct?

A. Yes.

Q. And did you actually sign for a letter that is dated still March 23, 2001? Did you actually have to sign for it?

A. No. It was just a letter in my mailbox. (Tr.2, 58)

Father further testified that he did not know the exact date that he received the letter. (Tr.2, 58).

Father did not personally sign for the letter sent to Lindbergh High School. It was merely placed in his mailbox in the Principal's Office. He was unsure what date it arrived, and what date he found it in his mailbox. Father cannot be expected to respond within 30 days of an unknown date. Moreover, Mother sent him an additional letter *within the time within which Father would have had to respond to the first letter*, had he actually signed for it on March 29th. Mother, by properly sending the second letter, admits that she failed to provide proper notice with her first attempt. Father signed for the certified letter on April 19, 2001. He filed his objections on May 3, 2001, which was well-within the statutorily prescribed 30 days (L.F. 7.)

Mother asserts in her brief that "As a result of the trial court's decision Petitioner, her husband and the minor child have been living under stressed circumstances. After the trial court's judgment prohibited her from relocating to Nevada, Petitioner purchased an inexpensive condominium as much of the proceeds from the sale of her home were used for attorneys' fees and expensive temporary housing and her income had been reduced. Petitioner and her husband continue to maintain two households and are incurring substantial travel expenses as they are forced to live in different states." (App. Sub. Br. 19) Father urges the Court to consider the transcript relative to Mother's current conditions.

Questions by Attorney Susi and Answers by Mother follow:

Q. Now, I'm going to take you back. You testified earlier that on March 23, 2001, you sent notice of a proposed relocation of residence for your minor child and for you to Henderson, Nevada, is that correct?

A. Yes.

Q. Okay. Did you receive any sort of objections to that relocation within 30 days from the 23rd?

A. No.

Q. Okay. And after the 30th day had passed, I believe that would have been…April 23, 2001, did you start preparing to move?

A. Yes.

Q. Well, just prior to the 30 days, I had quit my job… (Tr.2, 20)

Mother's unfortunate circumstances are clearly a result of her own choices rather the judgment of the trial court. Mother quit her job and sold her house all prior to realizing the outcome of the case. Indeed Mother testified to quitting her job *before* Father would have had to respond to the first letter, had he actually received it (Tr. 2 20). Most importantly, however, Mother's current circumstances are utterly irrelevant for this Court's consideration herein.

Substantial and credible evidence, including Mother's testimony, her Exhibit 4 from the January 30, 2002 hearing and her Exhibit 1 from the March 19, 2003 (Respondent App. A-2) hearing establish the fact that Father did not actually and properly receive the letter as required by the Statute until April 19, 2003. Indeed the *only* evidence presented at *either* hearing relative to Father's receipt of the letter was that it had been received on April 19, 2001 (Respondent App. A-2.) Father filed his Objections to Relocation on May 3, 2003. (L.F. 7-10). The trial court found that Father had received proper, registered mail notice for which he signed on April 19, 2001.(L.F. 94). The trial

court’s finding is supported by substantial and credible evidence. Therefore the trial court’s judgment is must be upheld.

II.

THE TRIAL COURT DID NOT ERR IN DENYING MOTHER'S MOTION TO SET ASIDE THE TRIAL COURT'S JUDGMENT BECAUSE IT HAD SUBJECT MATTER JURISDICTION UNDER 452.377 AS FATHER FILED HIS OBJECTIONS TO MOTHER'S RELOCATION WITHIN THE PRESCRIBED STATUTORY PERIOD; AND IN THE ALTERNATIVE, EVEN IF THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THIS FINDING, MOTHER'S CLAIMS HEREIN ARE BARRED BY 1) LACHES; 2) ACCEPTING THE BENEFITS OF A JUDGMENT; 3) THE PRINCIPLE THAT A 74.06 MOTION IS NOT A SUBSTITUTE FOR AN UNTIMELY APPEAL.

It is well-settled law in the state of Missouri that "In interpreting statutes, we are to ascertain the intent of the legislature. In doing so, we are to give the language used its plain and ordinary meaning. When the legislative intent is made evident by giving language employed in the statute its plain and ordinary meaning, we are without authority to read into the statute an intent, which is contrary thereto." Pavlica v. Director of Revenue, 71 S.W.3d 180 (Mo. App. W.D. 2002).

Section 452.377.2 R.S.Mo., the statute governing the relocation of children, expressly dictates the manner in which notice of relocation must be provided to the non-relocating parent. To wit: Notice "shall be giving in writing by certified mail, return receipt requested, to *any party* with custody or visitation rights…." (emphasis added)

Moreover, pursuant to Section 452.377.7, "The residence of the child may be relocated sixty days after providing notice, as required by this section, unless a parent

files a motion seeking an order to prevent the relocation within thirty days after *receipt* of such notice." (emphasis added) Id. Accordingly, in order to relocate with a minor child, the statute requires that notice not only be given but also that notice "as required by this section" actually be received by the non-relocating parent. Having enumerated the detailed notice requirements, and then again detailing that notice must be received in the manner previously dictated, it is clear that the legislature intended that the non-relocating parent must actually receive a certified letter. In the case at bar, Mother sent two separate letters to notify Father of her intended relocation of the primary residence of the minor child. She sent the first letter to his place of employment, Lindbergh High School. (Petitioner's Exhibit 4). Although the letter was received by someone at Lindbergh High School, Father did not sign for it. Mother testified that while she could not identify the signature on the card detailed "First Mailing," (March 29, 2001), the signature on the Second Mailing (April 19, 2001) was that of her ex-husband, Steven Tomey. (Tr.1, 245). Mother testified that in order to be sure that father received the letter, she sent an identical letter, certified mail, return receipt requested, to his home address. (Tr.2, 31) Father did receive and sign for this letter. He signed for the letter on April 19, 2001 (Respondent App. A-2.) He filed his Objections to Relocation on May 3, 2001, well within the requisite 30-day period. Accordingly, it was not until April 19, 2001, that father received notice, as expressly required by the statute, of Mother's proposed relocation.

A. **Mother failed to provide credible evidence that she gave Father actual notice of her intent to relocate in March, 2001. Rather, she provided proper, statutory notice which Father received on April 19, 2001.**

Mother cites several cases in support of the premise that when a party entitled to receive statutory notice actually receives notice, the technical compliance with the notice provisions of a statute are not necessary. Mother cites Gateway Frontier v. Selner, 974 S.W.2d 566 (Mo.App.E.D. 1988) and Macon-Atlanta State Bank v. Gall, 666 S.W 2d 934 (Mo. App. E.D. 1984) for the aforementioned limited premise. Gateway deals with a lease assignee who sued tenant and lease guarantors for unpaid rent following a tenant's surrender of the property. The court held that guarantors were not released from liability due to lack of written notice of lease modifications. Macon deals with a foreclosure sale wherein a bank failed to comply with a technical notice requirement. Clearly, these two cares are not factually instructive in the case at bar, which deals with a joint legal custodian's objections to the relocation of his only son. The Gateway court reasoned, citing Macon, "Statutes that impose technical requirements for notice should not be strictly enforced where the party seeking enforcement had actual notice and cannot show prejudice as a result of failure to follow the technical requirements." Id. At 571. Following the reasoning of the Gateway court, the record is bereft of any evidence establishing when Father received "actual notice" as argued by Mother. The record reveals only that Father received statutory notice on April 19, 2001 (Respondent App. A-2; Appellant App. A-8.) He therefore timely filed his Objections within the 30 days.

It is important to note that Father has been and would be greatly prejudiced herein by Mother's failure to provide proper statutory notice. Section 452.377.7 obligates father to object to Mother's proposed relocation within 30 days of receipt of Notice. If the court were to accept Mother's argument herein, Father would be unthinkably prejudiced because he would be subjected to a time limitation without an ascertainable beginning. Indeed, the time limitation is arguably a flaw in Section 452.377. To wit: 452.377.2 while detailing the requisite information which must be included in the relocating parent's letter, does not require the relocating parent to warn the non-relocating parent that he or she is subject to a 30 day statutory deadline within which to object. Arguably, a lay non-relocating parent who fails to recognize the legal implications of the letter she receives may conceivably be deprived of due process, as well as custody rights resulting from a lack of familiarity with the Missouri Statute. This is not the case in the case at bar, as Father, having received proper notice on April 19, 2001, responded timely with his objections to relocation.

Mother, clearly understanding that Father had not received her letter as required by the statute, properly sent the letter to Father a second time—to "be sure" that he received it. The thirty days within which Father was required to respond began to run upon his receipt of the letter. Father properly received the letter on April 19th, 2003. By sending an additional letter, Mother admits that she provided Father with improper notice. Mother cured her notice deficiency by sending the second letter, within the thirty days within which Father would have had to respond to the first letter, had he properly

received it. Therefore it is not necessary for the trial court to have found "actual notice" because Father received and responded to proper statutory notice herein.

Mother further requests the court to review Crawford v. Crawford, 986 S.W.2d 525 (Mo.App. W.D. 1995). In Crawford, the wife complained in her Answer to her husband's counter-motion to modify, that she had never been properly served with his counter-motion. She challenged the trial court's jurisdiction to hear her husband's counter-motion. The Court reasoned:

"The spirit behind procedural rules… is to ensure the orderly resolution and attain just results. They are not ends in themselves. For this reason, we do not generally consider noncompliance with rules or statutory procedures to warrant reversal in the absence of prejudice." Id. 527-28. However, as stated *supra*, any prejudice experienced by Mother was the result of her own poor judgment, and not of the timing of Father's response herein.

Missouri courts have similarly held that "disputes concerning the relocation of children must be resolved on their particular facts rather than a rigid application of the rules." Green v. Green, 26 S.W.3d. 325 (Mo. App. 2000).

In the case at bar, Mother realized that she had not sent her Notice of Relocation to Father in such a way that he would definitely receive it. She therefore sent it again, and Father responded timely. Mother argues that Father failed to timely respond. However, Father timely responded to the only letter that he properly received. Ironically, Mother appears to argue in her brief that statutory requirements be strictly applied to Father but not to herself.

Mother further urges the Court to consider Weaver v. Kelling, 53 S.W.3d 610 (Mo. App. W.D. 2001) Weaver is factually distinguishable from the case at bar. In Weaver, the mother verbally informed the father of her plans to relocate with the minor children. She then filed a Motion to Modify requesting that relief. She never sent him notice pursuant to Section 452.377 R.S.Mo. of her plans to relocate. The father filed not only his Answer to the mother's motion regarding relocation and challenged her desire to relocate with the children. The trial court granted the mother's request to relocate. On appeal, the father asserted that the mother had failed to comply with the notice requirements. The Court reasoned "one having actual notice is not prejudiced by and may not complain of the failure to receive statutory notice." Id. At 616. The Court further reasoned that because the father received notice and actually had the opportunity to challenge the relocation, he can not claim prejudice in not receiving statutory notice.

While the Weaver father never received statutory notice of his ex-wife's plans to relocate, Father in the case at bar received such notice. He signed for a certified letter on April 19, 2001. Mother in the case at bar, attempted to cure her improper notice by sending a letter in addition to the one she purportedly sent on March 27th, 2001. It was not until Father received this Notice that he filed his objections. It is important to note that Mother did not fail to follow the statutory notice requirements of 452.377. Rather, on April 16, 2001, she sent father notice certified mail, return receipt requested. Father filed his objections on May 3, 2001 (L.F. 7.) Mother's point herein its utterly moot.

Finally, Mother cites Baxley v. Jarred for the premise that lack of technical notice requirements were of "no consequence." 91 S.W.3d 192, 205 (Mo. App. W.D. 2002).

Again, the facts of Baxley are distinguishable from those in the case at bar. In Baxley, the mother sent the father *only one* letter detailing her plans to relocate with the minor child. Mother, in the case at bar, sent Father two letters. As evidenced by Mother's Appendix C containing Petitioner's Exhibit 4, Mother sent her first letter on March 27, 2001. In order "to be sure" that father received the proper notice, she re-sent the letter on April 16, 2001. In so doing, she crossed out the previous address and entered Father's correct home address (Respondent App. A-2.) It is important to note that Mother cured her own notice defect **within the thirty days** within which Father would have had to respond to the first letter, had he appropriately received it. Clearly the thirty days began to run upon Father's receipt of the second letter, as it is clear from the statute that the non-relocating party may object within thirty days of receipt. Therefore Baxley v. Jarred is not instructive herein.

Mother further cites the cases of Herigon v. Herigon, 131 S.W.3d 562 (Mo. App. W.D. 2004) and Wright v. Wright, WD 62155 (Mo.App.2004) in order to demonstrate that in order for actual notice to trigger the 30 day statutory deadline as required by 452.377.7, notice must contain the required information contained in 452.377.2. Interestingly, the Wright court reasoned, "If the notice was not proper, then [the relocating parent] cannot rely upon it to justify the relocation without permission from Respondent or the court." Id. The relocation sent by Mother to Father in April of 2001 was proper. Father timely responded thereto. Therefore the judgment of the trial court must be upheld.

The trial court did not err herein in failing to find actual notice of Mother's intention to relocate. Because Mother cured her notice defect, the trial court did not need to find "actual notice," because Mother provided statutory notice on April 16, 2001, to which Father timely responded. Therefore the judgments of the trial court must be upheld.

1. The Relocation Statute requires that the non-relocating party actually receive Notice of the proposed relocation.

Mother asserts that Section 452.337 does not require personal service of the notice on the non-relocating party, nor does it require restricted delivery. In so stating, Mother demonstrates her lack of understanding of the relocation statute. Pursuant to Section 452.377.7 "The residence of the child may be relocated sixty days after providing notice, as *required by this section*, unless a parent files a motion to prevent the relocation within thirty days after the receipt of the notice." Notice as required by this statute means: "Notice of a proposed relocation of the residence of the child…shall be given in writing by certified mail, return receipt requested, *to any party* with custody or visitation rights." To follow Mother's argument to its logical conclusion, if the statute did not require that the *individual* receive notice, then it would detail that the 30 days begins to run upon the party's receipt of notice. Moreover, if mere delivery of the notice were enough, then the statute would read: "The residence of the child may be relocated sixty days after providing notice, as required by this section, unless a parent files a motion to prevent the relocation within thirty days after the *delivery of said notice to the parent's known address."* Rather, it reads: "within thirty days of *receipt* of said notice." It is clear that

the legislature intended that the non-relocating party actually receive notice according to the statute. Mother received the return receipt of the March letter that was not signed by Father and realized that she had not sent Notice to Father (the party as required by the statute.) Accordingly, she cured her own notice defect and sent a second letter to Father's home address, where he signed for and timely responded to the Notice.

Petitioner's exhibit 4, indicating that Father signed for the Certified Letter on April 19, 2001 is certainly the best and only evidence of when he received the letter. Moreover, Respondent's Appendix A-2 demonstrates that Mother crossed out the Lindbergh High School address and re-sent the March 23, 2001 letter to Father at his home address on April 16, 2001. (Tr. 2, 59) She testified that she did so "to be sure" that he received it. (Tr. 2, 31). Father filed his objections on May 3, 2001 (L.F. 7). Father admits that he references March 23, 2001 as the date upon which he received the letter. (Tr. 2, 56). As Father's trial testimony and the physical evidence adduced indicate, although the letter was dated March 23, 2001, it was not even sent by Mother until March 27, 2001. Although someone at Lindbergh High School signed for it on March 29, 2001, and the only evidence to support when Father actually received the letter is the receipt of April 19, 2001, which controls herein.

2. Father's confusion was reasonable, having received one letter which failed to comply with the statute and one letter which did comply with the statute.

Father received one letter, on a date he is unable to ascertain or recall, which he found lying in his mailbox at work (Tr. 2 58). On April 19, 2001, he signed for and

received a letter which was sent certified mail, return receipt requested. (See Petitioner's Exhibit 4). Father did not fail comply with the statutory deadline. Rather he met it. Mother's argument herein is utterly moot. Mother characteristically mischaracterizes the findings of the Eastern District Court of Appeals. The Eastern District does not characterize "reasonable confusion" as a defense (Appellant App. A-31). Father it finds: Father received the second notice [the one in compliance with the statute] on April 19, 2001. Therefore, his objections on May 3, 2001 was timely." Id.

B. **Father filed his Objections to the Proposed relocation within the thirty-day time period required by Section 452.377(7) and therefore the trial court had subject matter jurisdiction to enter its orders.**

Mother cites the recent case of Baxley v. Jarred, 91 S.W.3d 192 (Mo. App. W.D. 2002) in support of her argument that the trial court acted outside of its jurisdiction in deciding the case at bar. Baxley is both factually and legally distinguishable from the case at bar. In Baxley, the unwed mother appealed a the denial of her request to relocate the primary residence of her child. In Baxley, the father received a notice by regular mail on February 29, 2000 that Mother planned to relocate the minor child to South Carolina. On May 2, 2000 the father filed a motion with the court seeking an order preventing the proposed relocation. After May 2, 2000, the mother moved to South Carolina with the minor child. Baxley at 195. Prior to hearing on the matters, the parties entered into a stipulated custody agreement. On January 16, 2001, Father's Motion to Modify was heard. Neither the mother nor her counsel appeared for the hearing. On that date, the

court denied mother permission to relocate with the child. The court further awarded the father primary physical custody of the child.

The mother appealed claiming that the trial court erred in preventing her relocation with the child because Section 452.377 conferred upon her an absolute legal right to relocate without express consent of the Father or court order. Id. at 196.

The Baxley court embarks upon an analysis of Section 452.377 and determines that there are two potential manners in which to relocate a child: (1) non-court ordered relocation where the nonrelocating parent does not object in a timely fashion as provided by Section 452.377.7, which would necessarily include cases where the nonrelocating parent affirmatively consents to the relocation; and (2) court-ordered relocation where the nonrelocating parent does objection to the relocation in a timely fashion but relocation is permitted by order of the court upon a determination that relocation is made in good faith and serves the best interests of the child.

Clearly the case at bar differs from Baxley in several significant ways. While Baxley involves the modification of a one-year old paternity judgment, the case at bar involves the modification of a six year old divorce. Moreover, while the mother in Baxley sent the father only one notice of relocation to which he responded over 63 days after receiving, the Mother in the case at bar sent Father two letters, one which he did not receive in the statutorily prescribed fashion and one which he did. He timely responded to the letter he received on April 19th, 2001 within 19 days of receiving it. In fact, the reason that Mother sent the second letter herein is because having received the certified mail receipt, she realized that Father did not sign for it himself. Accordingly, she

testified that she sent an identical letter to father at his home address "to be sure" that he received it. He received this second letter and responded to it timely.

In Baxley, the mother relocated with the minor child. In the case at bar, Mother did not relocate with the minor child, but rather submitted herself to the jurisdiction of the trial court. She requested the appointment of a guardian ad litem, and was consistently represented by counsel. Finally, the mother in Baxley did not testify at her hearing. Mother in the case at bar testified in both depositions and at trial. Nowhere in her lengthy testimony did she raise the issue that Father failed to timely respond to her intent to relocate. It is unthinkable that after years of litigation herein, Mother would subject her child, and Father to additional litigation. Her behavior is utterly unconscionable. Most importantly, however, her behavior is utterly contrary to the best interests of her child. Mother cites the following excerpt from Baxley v. Jarred, 91 S.W.3d 192:

The nearly complete overhaul of Section 452.377 in 1998 reflected an obvious disenchantment of the legislature with the existing version of the statute and an attempt to set forth a more detailed procedure for dealing with relocations to insure that relocating parents and non-relocating parents would be treated consistently, equally, and fairly *while protecting the best interests of the child*. Id. at 199. (emphasis added).

On March 13, 2002, the trial court denied Mother's request to relocate, ruling as follows: "it is in the best interests of the minor child that the parties exercise custody of the child according to the terms of the Parenting Plan adopted as part of the 1996 Decree with the modification made by the parties shortly after the divorce to extent Father's weekly Wednesday visit to overnights. This plan is the plan that the parties have been

following voluntarily for several years and the plan under which by all accounts the child had been thriving and benefiting from the substantial and regular contact of the two, capable, active parents who love him…" (L.F. 39).

It is well-settled law in Missouri that "When determining whether to allow a parent to remove children from the state, the paramount concern is the best interests of the child." Abernathy v. Meier, 45 S.W.3d 917 (Mo.App. 2001). It is important to note that in addition to the foregoing, the trial court rendered extensive findings regarding the best interests of the child as required by Section 452.375 R.S.Mo. The court specifically found, "Though the court finds that the personal choice to live in Nevada is not made in bad faith, the choice to live in Nevada is not necessary for the best interests of the child." (L.F. 37).

Mother suggests in her brief that a consideration of the best interests of the child is not necessary in a relocation case when the non-relocating parent fails to timely object to the relocation. Indeed, she suggests that if the court is to accept that Father "received" the March 23, 2001 letter on March 29, 2001 (although he clearly did not as discussed, *supra*) then by being a mere five days late in his filing of objections, he has waived an investigation into whether the relocation serves the best interests of his child. Indeed, Mother suggests that he essentially relinquishes his visitation rights and modifies his Decree without an investigation into the most paramount concern governing any and all statutes regarding child custody. Even the Baxley court asserts that the underlying legislative concern in a relocation case is the best interests of the child.

If Baxley is read to suggest that with respect to non-court-ordered relocation, a determination of the best interests of the child is irrelevant, the section 452.377.7 is utterly inconsistent with the dictates of Section 452.410 R.S.Mo. and Section 452.375 which necessitate an investigation into the best interests of the child. If this is the case then the statute is contrary to public policy and must be amended.

It is important to note that in the case at bar, the court specifically found after a trial that relocating to Nevada was contrary to the child's best interest. (L.F. 34) One hopes that Mother would not suggest that this Court allow her to undergo a course of action which was found by the trial court to be contrary to her son's best interest. Indeed it is well-settled law in the state of Missouri that "disputes regarding the relocation of children must be resolved on their particular facts rather than a rigid application of rules." Green v. Green, 26 S.W.3d 325 (Mo. App.2000). Notwithstanding the notice issues raised herein the fact remains that the trial court found that the relocation to Nevada would not serve the child's best interests.

Mother further argues that she was unduly harmed by Father's delay in filing his objections. This argument is wholly without merit.

Mother argues: When Respondent failed to file objections in court within the thirty-day deadline Petitioner rightfully assumed that she could rely on the clear language of the Relocation statute because Respondent's inaction logically resulted in implied consent to the relocation…She quit her job to make repairs and updates to her home, placing her home on the market with a real estate agent and packing their belongings. (App. Sub. Br. 29).

As the physical evidence clearly indicates, (Appellant App. A-8) Mother did not even send her first letter until March 27, 2001. It was not received by Lindbergh High School until March 29, 2001, and it was not received by Husband until April 19, 2001. As the Section 452.377.7 indicates, the thirty days in question does not begin to run until the notice is *received*, not when it is sent. Mother testified that she quit her job prior to the thirty days March 23, which would indicate that she quit her job prior to April 23, 2001 (Tr. 2, 20.) Moreover, the letter sent by Mother states as follows: "in addition to the reasons mentioned above, I would add that my present job here in St. Louis will end as of March 26th. I have found that my current employment leaves no room for growth or advancement." (App. Appendix B). Mother voluntarily quit her job prior to attempting to send the letter to Father on March 27, 2001. This was certainly well-within Mother's right to do. It is further important to note that Mother intended to relocate with her husband on June 15, 2001 (Respondent App. A-2.) However, she and her current husband were not even married until July 4, 2001. Her argument that she intended to relocate immediately were wholly without merit. Rather than "rightfully" relying upon the clear language of the relocation statute, she "incorrectly" interpreted it—as it was not her sending of the letter, but Father's receipt of the certified letter which controls the beginning of the 30 days. Father timely responded to the April 19, 2001 letter by filing his objections by May 3, 2001 (L.F. 7).

Mother's misinformed reliance on the Relocation Statute, while unfortunate, is not relevant here. Indeed the trial court ruled on March 18, 2003: "I would suggest that we confine our facts to the best extent possible to items that transpired after January 30,

2002, of which the Court would not have any knowledge, of course, because, you know, the evidence was done on that day." (Tr. 2, 23).

Contrary to the trial court's instructions, Mother asserts: "In this case, Respondent made every effort to delay and disrupt the proceedings and to hide the issue of his late filing from the trial court….Respondent's counsel further requested, and was granted four continuances which delayed the hearing nearly eight months." (App. Sub. Br. 30).

It is apparent from the of the January 30, 2002 hearing that the continuances were a result of the fact that Mother changed attorneys during the pendency of the case, not as a result of Husband's delay. (Tr. 1, 299) The hardships to which Mother refers are results of her own choices: leaving her job, changing attorneys, selling her home before being fully aware of the outcome of this case. They are certainly unfortunate, but not the result of Husband's behavior. Therefore, they irrelevant evidence and inappropriate for consideration by this Court.

In her subparagraph 4 of her Second Point Relied On, (App. Sub. Br. 33) Mother asserts that the trial court erred in failing to enter a ruling pursuant to subsection 10 of the 452.377 R.S.Mo. Said argument is contrary to Missouri Supreme Court Rule 83.07, and must be stricken from her brief. Rule 83.07 provides: "The substitute brief…shall not alter the basis of any claim that was raised in the court of appeals brief." Mother has raised this argument for the first time herein, and it is not properly before this Court. Mother's argument must therefore be stricken herein.

Finally, Mother fails to consider the fact that Father's Motion to Modify was also pending before this Court on January 30, 2002. (L.F. 19) In his Motion to Modify Father

requested joint legal and physical custody of Sam if Mother remained in St. Louis and Primary Custody if Mother relocated to Nevada. (L.F. 19) Pursuant to Section 452.410 R.S.Mo. A court shall not modify a custody decree unless it finds "that a change has occurred in the circumstances of child or his custodian and that the modification is necessary to serve the best interests of the child." Id. Accordingly, an examination of the best interests of the child is necessary herein. The factors the court must consider when determining the best interests of the child are set forth in Section 452.375 R.S.Mo. These factors include not only "the needs of the child for a frequent, continuing and meaningful relationship with both parents and the ability and willingness of parents to actively perform their functions as mother and father for the needs of the child." But also, "the intention of either parent to relocate the principal residence of the child." Accordingly, relative to Father's Motion to Modify, these issues were properly before the court. In addition, the court denied Father's Motion to Modify and indicated that the custody plan that the parties had been exercising served the best interest of the child. Therefore it was not only denial of Mother's relocation but also Father's Motion to Modify which was properly before the court and which led to the March 13, 2002 judgment herein.

Father timely filed his objections to Mother's proposed relocation. The trial court was endowed with Subject Matter Jurisdiction to enter the orders herein. On March 26, 2003, the trial court specifically found [Mother] did not testify that Father was the person who signed for the March 2001 letter, nor did she present any other evidence to establish the date upon which Father eventually received the letter. She did, however, present evidence, (Petitioner's Ex. 4) at the trial in January 2002 that documented that Father had

received a later registered mail notice that she sent in April 2001 to Father's home address on or about April 16, 2001….Father filed his objections within the 30 day period prescribed by 452.377 therefore the court had jurisdiction to enter the Judgment of March 13, 2002." (L.F. 95) "Once a factual question of the court's jurisdiction is raised, the movant bears the burden of demonstrating that the court's exercise of jurisdiction is improper." Soucy v. Soucy, 979 S.W.2d 504 (Mo.App.E.D. 1998). As evidenced by the findings of the trial court, which are supported by the record herein, Mother failed to meet that burden. Therefore the judgment of the trial court must be upheld.

3. ***Mother's argument effectively requests this court to impose an exception on the 30 day deadline by shortening it.***

Mother cites Heslop v. Sanderson, 123 S.W.3d 214 (Mo. App. W.D. 2003) in support of the strict interpretation to be given to the 30 day timeline within which a non-relocating party must file his objections to relocation. However, in her analysis, Mother omits two very important points: 1. In Heslop, the relocating parent sent only one certified notice of relocation. 2. In Heslop, the non-relocating parent actually received and signed for the letter that was sent to him. These two issues distinguish Heslop from the case at bar. Indeed, Heslop itself provides, "[The thirty day time period within which the non-relocating parent may file objections] could not be shortened as a matter of due process." Id. 220. Accordingly, arguing, as Mother does, that the first letter she sent (the letter which Father indicated that did not in fact sign for and therefore receive), should have started the clock ticking on the 30 days, she is essentially asking that the thirty days within which Father must respond, be shortened—and shortened to an incalculable

number of days, as Father is unable to ascertain when he received notice. This is clearly contrary to due process, and specifically contrary to the dictates of Heslop, cited by Mother herein.

C. **The trial court was endowed with subject matter jurisdiction to decide the matter herein.**

Mother cites Williams v. Williams, 932 S.W. 2d 904 (Mo. App. E.D. 1996), and Ferguson v. Director of Revenue, 783 S.W.2d 132 (Mo. App. E.D. 1990) for the premise that Judgments that lack subject matter jurisdiction are void from their inception. (App. Br. 25). However, these cases are not instructive herein, because Father timely filed his objections to relocation, the trial court had the requisite subject-matter jurisdiction to enter the judgment herein. Therefore the judgment of the trial court must be upheld.

Moreover, Mother cites Feldmann v. McNeill, 772 S.W.2d 409 (Mo. App. E.D. 1989) for the premise that not even a confession of judgment can confer subject matter jurisdiction. Id. at 410. In Feldman, the court ruled that the trial court lacked subject matter jurisdiction because a driver failed to petition for review of the Director of Revenue's revocation of Driver's operating license within 30 days as prescribed by the statute. Unlike the driver in Feldman, Father in the case at bar timely filed his Objections to Relocation within 30 days as prescribed by 452.377.7. Therefore the trial court had subject matter jurisdiction to enter the judgment herein. Accordingly, neither Feldman, nor Evans v. Director of Revenue, 871 S.W.2d 90 (Mo. App. E.D. 1994) are instructive herein. Therefore the judgment of the trial court must be upheld.

Even If the Court should find that Father's response was untimely, such was readily ascertainable from the record at the time of trial. Therefore, Mother is barred by the doctrine of Laches from filing her Motion to Set Aside. London v. London, 826 S.W.2d 30 (Mo. App. W.D. 1992). In London, the wife attempts to set aside her judgment of dissolution six and one half years after the judgment was entered on the theory that the trial court was without jurisdiction to have entered the judgment because thirty days had not elapsed since the filing of the judgment and the entry of the decree. The court held that this error was readily ascertainable from the record at the time of trial. "Invocation of laches requires that a party with knowledge of the facts giving rise to his rights, delays assertion of them for an excessive length of time and the other party suffers prejudice therefrom." Id. at 34 citing Grieshaber v. Greishaber, 826 S.W. 2d 30.

In the case at bar, if the Court is to believe Mother's argument herein, then Mother would have known by April 29, 2001 (Nearly three years ago) that Father's response was untimely. Accordingly, Mother would have been aware of the facts giving rise to her rights and has delayed assertion of them for nearly *three years*. Like in London, the facts would have been readily ascertainable from the record. Father has been greatly prejudiced in that he has paid considerable attorneys fees in order to pursue a trial in this matter as well as enduring the grueling mental anguish inherent in a custody battle. Father testified that further that he sees his son less now that Mother has relocated him to a different school district. (Tr. 2, 62). Accordingly, Mother should be barred from bringing this action, and the Judgment of the trial court must be upheld.

This entire appeal must further be dismissed because it is well-settled law in Missouri that "Rule 74.06 is not intended as an alternative to a timely appeal….Relief from a trial court judgment, which may have been available by appeal, is not necessarily available by a Rule 74.06 proceeding." Love v. Board of Police Commissioners, 943 S.W.2d 862 (Mo. App. E.D. 1997).

Mother chose not to file an appeal of the judgment herein. When questioned on March 23, 2003 regarding her failure to file a Notice of Appeal, Mother responded: "We researched counsel and the time had elapsed. We could not find adequate counsel and the time had elapsed until now." (Tr.2, 46). Accordingly, Mother admits that she has inappropriately used the 74.06 Motion to attack the judgment in lieu of filing a timely appeal. Mother's appeal is not properly before the court and must be dismissed. Therefore the judgment of the trial court must be upheld.

The court should note, however, that although Mother did not file a Notice of Appeal, she did file post-trial motions herein. She requested not only a new trial, but she also requested that the court amend the Judgment such that Mother be entitled to enroll the minor child in the school district associated with her residence in St. Louis. (Resp. App. 2) Nowhere in her lengthy testimony on January 30, 2002 nor in her post-trial motion does she raise the issue of lack of jurisdiction.

On May 23, 2002, the trial court entered a judgment regarding the post-trial motions filed herein. The Court ruled, "The determination that Petitioner's Residence was to be the residence for school purposes is in the best interest of the child…Therefore paragraph 22 of the judgment entered on March 13, 2002 is amended to reflect the intent

of the court that Mother's residence as of the start of school in Fall 2002 shall be the designated residence for school purposes." (Appellant App. A-25)

Based on the ruling of the court, Mother moved the minor child to the Parkway School District. (Tr. 2, 38-39). It is well-settled law that "a litigant who has voluntarily and with knowledge of all the material facts accepted the benefit of a decree or jugdment of a court cannot afterwards take or prosecute an appeal to reverse it." Hicks v. Hicks, 859 S.W.2d 842, 845 (Mo. App. E.D. 1993) citing In re Marriage of Tennant, 769 S.W.2d 454, 455 (Mo. App. 1989). "The reason for the rule is that a party cannot proceed to enforce and have the benefit of such portions of the judgment as are in his favor and appeal from those against it…" Id. In the case at bar, mother partially prevailed in her Motion to Amend Judgment with respect to the designation of her residence as the residence of the child for educational purposes. She then enrolled the child in the school district in which she lives (Tr. 2, 38). Accordingly, following the trial, rather than filing a notice of appeal, she requested relief in the form of a post trial motion, and such relief was granted. She accepted the benefits of the judgment by enrolling her child in school. She is therefore estopped from asserting that this judgment is void.

The evidence presented at trial in this matter on January 30, 2002 and March 19, 2003 established that that Father timely filed objections to relocation. As the trial court found, "[Mother] did not testify that Father was the person who signed for the March 2001 letter or present other evidence to establish the date upon which Father eventually received this letter. She did, however, present evidence (Petitioner's Ex. 4) at the trial in January 2002 that documented that Father had received a later registered mail notice that

she sent in April 2001 to Father's home address on or about April 16, 2001. Father timely filed his Objections to relocation on May 3, 2001 (L.F. 7). Mother failed to meet her burden of proving that the Court was without jurisdiction to enter the Judgment of March 13, 2002. Substantial evidence supports the findings of the trial court. Therefore the Judgments of the trial court, supported by substantial evidence, must be upheld.

CONCLUSION

For the foregoing reasons, Respondent/Father requests this Court affirm the trial court's denial of Appellant/Mother's Motion to Set Aside Judgment. The trial court was well-within it jurisdiction to rule on Father's timely filed Objections to Relocation herein. In so doing, after extensive trial and motion practice, the trial court determined that relocation was *contrary* to the best interests of the minor child. The trial court's judgment with respect to its jurisdiction and the timeliness of Father's Objections to Relocation as well as its determination regarding the best interests of the minor child are supported by substantial and credible evidence. Therefore the Judgment of the trial court must be upheld.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

To the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances:

1. The representations in this Brief are not represented for improper purpose.
2. The claims and contentions in this brief are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
3. The assertions in this brief have evidentiary support;
4. Any denial of factual matter in this brief is warranted by the evidence.

This brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 (b). This brief contains 11,284 words according to the word count feature of Microsoft Word 97 for Windows. The diskette filed with this brief contains one file entitled Tomeybrief.doc. The file consists of Respondent's Brief in Microsoft Word 97 for Windows. The diskette has been scanned and found to be free of any detectable viruses.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all parties of record on this 7th of May, 2004 by mailing same, postage prepaid to Jennifer Suits, 1311 Musket Hollow, St. Charles, MO 63303 and Patricia Susi, 120 S. Central, Suite 1750, Clayton, MO 63105.

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